

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

PERIODIC REPORTING
(PROPOSAL THIRTEEN)

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Docket No. RM2015-7

**MOTION OF AMAZON FULFILLMENT SERVICES, INC.,
TO STRIKE PORTIONS OF REPLY COMMENTS
FILED BY UNITED PARCEL SERVICE, INC.
ON JULY 22 AND 23, 2015**

(July 29, 2015)

Amazon Fulfillment Services, Inc. (“Amazon”) respectfully moves to strike the econometric model sponsored by United Parcel Service, Inc. (“UPS”) and its cost witness, Dr. Kevin Neels, on July 22 and 23, 2015 (the “Latest Neels Model”).¹

Amazon’s customers are best served by competitive and compensatory postal rates. Like the Commission, Amazon wants the costs of City Carrier Street Time to be estimated as transparently and accurately as possible. With those aims in mind, Amazon has not objected to UPS efforts since April 2015 to obtain disclosure of sensitive Postal Service data, obtain a substantial extension of time

¹ The cost model at issue is referenced in the July 22 UPS “Reply to Comments, etc.” at 1-2, 5-7, 8 (lines 3-12), and 19 (lines 3-4); and in the July 23 “Second Supplemental Report of Kevin Neels” at 1-2 and 11-29. Amazon has not yet been able to review UPS library reference UPS-LR-RM2015-7/NP2, which UPS filed entirely under seal on July 22. See Order No. 2618 (issued July 28, 2015) (granting Amazon access to library reference). The present motion covers all portions of the library reference that support the new UPS model.

to enable creation of a new model with that data, and obtain a further extension of time to respond to criticisms of those models by other parties.

To ensure a transparent and constructive process, however, interested parties must have an opportunity to comment on the underpinnings of all cost models submitted by other parties. As described in the Motion of the United States Postal Service to Strike Third Set of Models Submitted by United Parcel Service filed on July 27, 2015, UPS has exceeded the scope of Commission Order Nos. 2455 and 2571, which authorized UPS to file reply comments on July 22 defending the models that UPS previously submitted on June 8 to file any new or substantially revised models after other parties no longer could comment. Although Amazon's review and assessment are ongoing, Dr. Neels himself has detailed in his submissions several material differences between his latest model and the "National Form 3999" model that he submitted on June 8. Crediting the Latest Neels Model filed on July 22 and 23 would also violate the notice requirements of the Administrative Procedure Act because Amazon and other interested parties have not been given a meaningful opportunity to comment on that model. For the foregoing reasons, described further below, the Latest Neels Model should be stricken.

ARGUMENT

The filing of the Latest Neels Model was not authorized by Order No. 2455. The order, as modified by Order No. 2571, limited the July 8 comments of Amazon and the Postal Service, and the July 22 reply comments of UPS to "comments on UPS's supplemental report"—i.e., the "Supplemental Report" of Dr. Neels filed on

June 8, 2015. Order No. 2455 at 11 & 12 ¶ 6. The Latest Neels Model was not a “comment” in defense of the models submitted by UPS on June 8, but rather constituted a new and substantially different model. By Dr. Neels’ admission, the Latest Neels Model differs from the National Form 3999 Model submitted on June 8 in at least three major respects:

- (1) The new model substitutes “simple linear regression [imputation] models” for the “negative binomial [imputation] models” used in its predecessor, his June 8 “3999” model. Neels Second Supp. Report at 11-12, 15. None of Dr. Neels’ previous imputation models in this case relied on “simple linear regression models.”
- (2) The new imputation model adds new explanatory variables, which he dubs “intertemporal volume change indexes.” *Id.* at 12, 15-16, 19-20. None of Dr. Neels’ previous imputation models included such variables.
- (3) In contrast to Dr. Neels’ previous second-stage regression models, which developed variabilities separately for deviation parcels and in-receptacle parcels, the second-stage regression in the Latest Neels Model includes only a combined parcel variable, “parcels.” *Id.* at 26.²

The results of the Latest Neels Model also differ greatly from the results of its June 8 predecessor. In particular, the city carrier cost variability percentage for

² It is possible that review of Dr. Neels’ workpapers may reveal other significant differences between the June 8 and July 23 versions of his models. Amazon cannot evaluate this possibility, however, until the company’s experts have an opportunity to complete review of Library Reference UPS-LR-RM2015-7/NP2.

parcels estimated in the current model differs by a factor of two from corresponding figures in the June 8 model. The Latest Neels Model estimates that 8.03 percent of City Carrier Street time costs vary with parcel volume; in the June 8 model, the corresponding figure is 15.98 percent (11.84 percent + 4.14 percent). Neels Second Supp. Report at 26.

Long-standing Commission precedent makes clear that a new cost study is an improper reply to criticism of a study previously offered by the same party in the same case. As the Commission explained 35 years ago in granting a motion by UPS to strike cost studies submitted by the Postal Service for the first time in its rebuttal testimony, the “additional studies, if the Postal Service wanted to rely on them to support its proposal, could and should have been included in its direct case. . . . We are requiring that the Postal Service file in its direct case the studies on which it intends to rely.” Docket No. R80-1, Order No. 362 (issued November 24, 1980) at 3-4.³

Moreover, giving weight to the Latest Neels Model on the present record would violate the notice requirements of the Administrative Procedure Act. Except in circumstances absent here, the Administrative Procedure Act requires an agency to publish notice of any proposed rule, including “the terms or substance

³ The courts apply a similar standard. See 22 Wright & Graham, *Fed. Practice & Procedure* (2nd ed. 2012), § 5164 at 118 (“[I]f the court feels that the proffered evidence should have been offered as part of the party’s case-in-chief, rather than being held back to sandbag the opponent, the court can exclude the evidence as ‘improper rebuttal.’”); *id.* at § 5177.1 & nn. 9 & 10 (citing cases); *Corson & Grumman Co. v. NLRB*, 899 F.2d 47, 50 n. 4 (D.C. Cir. 1990) (“We require petitioners and appellants to raise all of their arguments in the opening brief to prevent ‘sandbagging’ of appellees and respondents and to provide opposing counsel the chance to respond.”).

of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. § 553(b)(3) (requirement); *id.*, § 553(a) (exceptions). The courts have held that Section 553 permits an agency to promulgate a rule that differs from a proposed rule only if the final rule is a “logical outgrowth” of the proposed rule. *Allina Health Services v. Sebelius*, 746 F.3d 1102, 1107 (D.C. Cir. 2014) (citing cases). “A final rule qualifies as a logical outgrowth” of the proposed rule if interested parties “‘should have anticipated’ that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.” *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079-80 (D.C. Cir. 2009) (*citing Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004)). “By contrast, a final rule fails the logical outgrowth test and thus violates the APA’s notice requirement where interested persons would have had to divine the agency’s unspoken thoughts, because the final rule was surprisingly distant from the proposed rule.” *CSX Transp.* at 1080 (citations and internal quotations omitted). This standard is violated when an agency adopts a costing, ratemaking, or other technical standard based on methodologies or “technical studies and data” that were not disclosed in time for comment by affected parties. *Allina*, 746 F.3d at 1107-08, 1110-11; *City of Idaho Falls, Idaho v. FERC*, 629 F.3d 222 (D.C. Cir. 2011); *CSX Transp.* at 1082-83; *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008).

Striking the Latest Neels Model is required to avoid violation of this standard. Nothing in the Commission’s orders in this case—or in the filings of UPS itself—put other parties on notice before July 8, 2015, the filing date for the last round of comments available to other parties, that UPS would later file a cost model

that substantially differed from the models filed by UPS on March 18 and June 8. To credit a model submitted by UPS for the first time after the opportunity for responsive comment by other parties had expired, the other interested parties would need to have received notice—well before July 8—that the Latest Neels Model would be unveiled, including the particular differences between the model and its predecessor.

The gravity of the due process violation here is heightened by the subject of this proceeding, because the attribution of City Carrier Street Time costs is one of the most important, complex, controversial and fact-intensive tasks that the Commission faces. Hence, as the Commission has repeatedly held, studies and data on city carrier costs may not lawfully be credited without an opportunity for rebuttal by affected parties. *Mail Order Ass'n of America v. USPS*, 2 F.3d 408, 428-30 (D.C. Cir. 1993) (remanding city carrier cost attribution because the parties challenging it had not received an opportunity to challenge it before the Commission); Order No. 1482 in Docket No. R2006-1 (Nov. 8, 2006) (holding that Postal Service responses to Presiding Officer's Information Requests concerning city carrier costs could not be given evidentiary weight when too little time remained for other parties to rebut the responses); Order No. 1 in Docket No. R2006-1 (Dec. 22, 2006) (declining to give evidentiary weight to Office of Consumer Advocate responses to Presiding Officer's Information Requests concerning city carrier costs).

In conclusion, the Commission should strike the Latest Neels Model to enforce the scope of its prior orders and ensure that all parties have had sufficient

opportunity to review and comment on the cost models being considered by the Commission.

Respectfully submitted,

/s/

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